KLUANG WOOD PRODUCTS SDN. BHD. & ANOR.

v.

HONG LEONG FINANCE BERHAD & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' SITI NORMA BTE YAAKOB J.
[CIVIL SUIT NO.D2-22-150-88]
18 APRIL 1994

TORT: Misrepresentation - Consideration of the elements that give rise to a duty of care when a business or professional representation is made - Whether the representation of a financial institution to syndicate end financing based on which the developer obtains a bridging loan and goes ahead with the housing project would amount to misrepresentation if the financial institution fails to come up with the end finance.

CONTRACT: Collateral contract of warranty - What is - To establish a collateral contract what must a plaintiff show - Time gap of two months from the date of oral representation and the signing of the contract - Whether the oral representation acted upon can amount to a collateral contract - Whether the substance of the oral promise if not imported into the written contract contradicts the written contract.

PRACTICE & PROCEDURE: Res judicata and issue estoppel - Directors of a company sued on a guarantee - Whether in a subsequent suit instituted by them with the company also as a plaintiff they can raise issues they ought to have raised in the previous proceedings - Whether the fact that the company was not a party in the suit instituted for the enforcement of the guarantee given by the directors does not bar the company from raising the issues which the directors ought to have raised in defence in the previous action in the subsequent proceedings - Privity of interest between the company and its directors - Applicability of res judicata to foreclosure proceedings.

PRACTICE & PROCEDURE: Precedent - Later decision of the Supreme Court in conflict with an earlier decision - Duty of the Court.

The plaintiff is a developer who was developing a housing project to be known as Taman Mewah. The second plaintiff is a director of the first plaintiff. The first plaintiff approached the first defendant for a bridging loan and end finance. The first defendant approved the bridging loan and also assured a syndicated end finance of RM 26 million which would be managed by them and assured the plaintiffs that their participation in the syndication would be RM 5 million. The plaintiffs had so planned the project that the end finance would come in time to service the interest on the bridging loan by March 1984. The first defendant failed to take serious steps to ensure the provision of the syndicated end finance and also did not keep up its assured end finance of RM 5 million. Due to the plaintiff's default in the payment of interest on the bridging loan the first defendant initiated foreclosure proceedings against the charged property and obtained an uncontested order for auction sale of the property. Subsequently the first defendant filed a civil suit to enforce the guarantee of the second plaintiff in proceedings under O. 14 of the Rules of the High Court 1980. There were no bidders at the first auction and the reserve price had to be progressively reduced for want of bidders. At the 5th auction after the reserve prive was reduced to RM 3.2 million the second defendant, a wholly owned subsidiary of the first defendant made a successful bid as the sole bidder.

The plaintiffs claim that the first defendant was negligent in its representation to the plaintiffs that it would procure the sum of RM 26 million as end finance and make it available during the first quarter of 1984. The plaintiffs contended firstly that the failure to come up with the assured end finance was a breach of collateral warranty and secondly that the power to sell the charged property was not exercised in good faith and the auctions were conducted in a negligent manner to enable the second defendant to purchase the property at a reduced price.

The first defendant denied any representation much less a negligent representation about the end finance and further contended that the action of the plaintiffs was barred by *res judicata*.

Held:

[1] From the evidence it is seen that the first defendant had assured, through its southern regional manager, that it would syndicate end finance of RM 26 million in which it would participate to an extent of RM 5 million and that the said end finance would materialise by March 1984. This representation was not kept and no serious efforts were taken by the first defendant to secure the end finance and this resulted in the default of payment of interest on the bridging loan. The transaction was a business or a professional transaction and the first defendant's Chief Manager, Southern Region had knowledge that the said representation was the basis on which the plaintiffs were to act and in the circumstances it was reasonable for the plaintiffs to have acted on such representation. The first defendant had committed the tort of misrepresentation.

[2] The alternate claim of collateral contract of warranty has been established as the first defendant made a representation intended to be acted upon by the plaintiffs which induced the signing of the contract and without which the plaintiffs would have gone for finance elsewhere and this representation amounted to a warranty collateral to the main contract. Though it was stated in defence that there was lapse of about two months from the date of the representation and the actual execution of the contract, there is no requirement in law that reliance on an oral representation is acceptable only if made at the time the written contract was entered into. In the circumstances there was a collateral contract of warranty and the first defendant had committed breach of the same.

[3] The claim founded on lack of good faith in the conduct of the auctions is not borne out by the evidence on record.

[4] The contention of the defendant that the decision in the originating summons for foreclosure operates as a bar by *res judicata* against the claim of the plaintiffs is unsustainable as the Supreme Court in *Kandiah v. Public Bank*, held that *res judicata* is not applicable to foreclosure proceedings as an order for sale is not a judgment or decree. Though this is in conflict with the earlier decision of the Supreme Court in *Sindoma Realty Sdn. Bhd. v. Overseas Chinese Banking Corporation*, the later decision is to be followed as it would appear to have overruled the earlier decision.

[5] Nevertheless the principle of *res judicata* bars the claim of the plaintiffs as the issues raised in this proceeding could have been raised and litigated by them in the suit filed by the defendant for enforcement of the guarantee against the second plaintiff.

[Plaintiffs' claim dismissed with costs].

Cases referred to:

Overseas Chinese Banking Corporation Ltd. v. Philip Wee Kee Tuan [1984] 2 MLJ 3 ***(cit)***
Tan Swee Hoe Co. Ltd. v. Ali Hussein Bros. [1980] 2 MLJ 16 ***(refd)***
Kandiah v. Public Bank [1993] 4 CLJ 332 ***(foll)***
Sindoma Realty Sdn. Bhd. v. Overseas Chinese Banking Corporation[1989] 1 CLJ 246 / [1989] 1 MLJ 377 ***(refd)***
Moodie v. Inland Revenue Commissioners & Anor. [1993] 2 CLJ 583 / [1993] 2 All ER 49 ***(foll)***

Other sources referred to:

Negligence, Charlesworth & Percy, 8th Edn., p. 83

For the plaintiffs - Sri Ram (Fiona M. Bodipalar with him); M/s. Sri Ram & Co.
For the defendants - C. Abraham (N. Navaratnam with him); M/s. Shearn Delamore & Co.

JUDGMENT

Siti Norma bte Yaakob J:

In 1983, the 1st plaintiff in these proceedings was a licensed housing developer and the registered proprietor of land held under Johor Grant No. 2365, Lot 506, Mukim of Kluang, Daerah Kluang. The 1st plaintiff had purchased this 33 acres for the purpose of developing it into a housing estate comprising of 489 units of different types of houses to be known as Taman Mewah. To finance the project, the 1st plaintiff approached the 1st defendant for a bridging loan

for the construction of the houses and end finance to assist interested house buyers in purchasing the houses.

Negotiations over the bridging loan and end finance took place in July/August 1983 and on 24 August, 1983, through AB15-16, the 1st plaintiff formally applied for a bridging loan of RM4.5 million and end finance of RM21 million.

On 26 October 1983, the 1st defendant, by their letter AB17-22, approved the loan application and, *inter alia,* offered the 1st plaintiff the following:

(1) A bridging loan of RM3.5 million to be secured *inter alia* by a first fixed charge of the property together with the personal guarantee of a number of named persons including the 2nd plaintiff.
(2) A syndicated end finance of RM26 million to be managed by them for a fee of 0.5% of the syndicated loan.
(3) Their participation in the syndication to an amount of RM5 million.

The terms and conditions imposed by the 1st defendant were accepted by the 1st plaintiff and on 29 October 1983, 3 days after AB17-22 was accepted, the 1st plaintiff created a charge, AB31-47, over the property in favour of the 1st defendant and the 2nd plaintiff together with the other named persons who were to give their personal guarantees, executed the guarantee, AB23-30. These securities were only to cover the bridging loan and following the execution of the charge, the first payment of RM200,000 of the bridging loan was disbursed to the 1st plaintiff on 31 October 1983.

By that time, the 1st plaintiff had already commenced site works and other preliminaries on the property.

In January 1984, the 1st defendant prepared a placement memorandum, AD5-100, based on information supplied by the 1st plaintiff, giving full details of the development, its projected costs, the sources of finance and identifying the persons responsible for the project. The purpose of this placement memorandum was to enable the 1st defendant to invite other interested financial institutions to participate in the syndication of the end finance.

There is evidence that besides the 1st defendant, 3 other financial institutions responded positively to the 1st defendant's invitation, they being Public Finance Berhad, Malaysia Credit Finance Berhad and Malayan Banking Berhad, but as events showed later, nothing came out of their intended participation. In the end there was left only the 1st defendant's commitment to provide end finance to the amount of RM5 million, for which security was given by the 2nd plaintiff together with the other Directors of the 1st plaintiff and Feng Yuan Holding Pte. Ltd. in the form of a guarantee agreement dated 16 November 1984, AB216-228.

Whilst the 1st defendant were making attempts to get other potential financial institutions interested to participate in the end finance through the placement memorandum, the 1st plaintiff was also at the same time entering into sale and purchase agreements with individual purchasers for the 209 units of low cost 2 storey link houses and 116 units of double storey terrace houses to be built in Phase 1, and by December 1984, the 1st plaintiff had submitted 116 applications for end finance by these purchasers to the 1st defendant.

It is common ground that the 1st defendant disbursed the bridging loan of RM3.5 million fully to the 1st plaintiff and this enabled the 1st plaintiff to partially complete the 325 units of Phase 1. However, by December 1984, they found that they were in dire financial strain as the syndicated end finance that was promised never came at all.

To begin with, Public Finance Berhad's condition for participation was not met by the 1st defendant. Public Finance was willing to commit RM3 million towards the syndication of the end financing but for such participation imposed, *inter alia,* the conditions that the 1st plaintiff surrender the titles to the lots financed by them as security together with the 1st defendant's undertaking that they, the 1st defendant, relinquish all their rights and interests over the same

lots and that the lots be excluded if the 1st defendant should initiate foreclosure proceedings against the 1st plaintiff. Public Finance's offer dated 20 April 1984, AD111-115, was only open until 30 June 1985, after which any extension would be at their absolute discretion.

The 1st plaintiff accepted the terms and conditions imposed by Public Finance and executed the security documents asked for by Public Finance but the 1st defendant failed to give the undertaking sought by Public Finance but, instead, gave a qualified one on 8 November 1984, at AB128, which was not acceptable to Public Finance. On 14 March, 1986, through P1, Public Finance cancelled its offer as, by that time, the offer had lapsed by effluxion of time.

Likewise, by letter dated 27th April, 1984, AD116-120, Malaysia Credit offered to the 1st defendant its participation in the syndication of RM3 million. It is not disputed that the 1st defendant never extended this letter to the 1st plaintiff, as a result on 19 September 1984, at AB126, Malaysia Credit complained of the delay in the receipt of the security documents. This prompted the 1st defendant to write D3 dated 16 October 1984, requesting the 1st plaintiff to liaise directly with Malaysia Credit in the preparation of the security documents. On 28 November 1984, by AD129, Malaysia Credit withdrew from the syndication as the matter had been considerably prolonged.

There is also evidence that by 29 March 1984, Malayan Banking Berhad had also agreed to participate in the syndication to the amount of RM5 million but like Public Finance and Malaysia Credit, nothing came about of this proposed participation.

Despite executing the security at AB216-228, the 1st defendant did not provide any part of the RM5 million end finance that they had promised and this resulted in the 1st plaintiff being unable to meet their obligations to make the monthly interest payments due and payable under the bridging loan. By the end of December 1984, the 1st plaintiff found that they were in arrears of 2 months interest and by January 1985, work on the site had completely stopped.

Following the 1st plaintiff's default on the interest payments, the 1st defendant's solicitors sent a letter of demand, AB231 dated 17 January, 1985, and when the 1st plaintiff failed to respond, the 1st defendant instituted legal proceedings in Johor Bahru, firstly by foreclosing the charged property and secondly by suing the guarantors, including the 2nd plaintiff. In Johor Bahru Civil Suit No. 354/85, filed on 8 May, 1985, the 1st defendant obtained final judgment against the 2nd plaintiff for RM3,673,051.50 on 5 March 1986.

The 1st defendant obtained an order for sale of the charged property on 17 July 1985. An auction date was fixed for 10 November 1985, but this was never proceeded with as the valuation of the land was only completed on 23 December 1985. Another auction date was obtained for 9 March 1986, at which a reserve price of RM5 million was fixed. The auction proved unsuccessful as there was only one bidder who offered to purchase the land at RM3 million, well below the reserve price.

A second auction date was set for 25 May 1986, and the reserve price was reduced to RM4.5 million, but this second auction proved abortive as there was no bidder.

The reserve price was further reduced to RM4 million for the third auction fixed for 29 June 1986, and this exercise also suffered the same fate as the previous auction as did the subsequent fourth auction fixed for 9 November 1986, where the reserve price was reduced to RM3.5 million. There were no bidders at both auctions.

However, before the fourth auction, the 1st defendant applied to Bank Negara on 29 October, 1986, at AD161, to bid at the fourth auction, but since the approval only came on 19 November, 1986, through AD165, well after the date of the fourth auction, the 1st defendant were not able to bid at that auction.

For the fifth auction set for 25 January 1987, the reserve price was reduced to RM3.2 million and it was at this auction that the 1st defendant's Marketing Manager, DW1, as the sole bidder successfully purchased the property at RM3.2 million in the name of the 2nd defendant, a wholly owned subsidiary of the 1st defendant.

As the new owner of the property, the 2nd defendant went on to complete the construction of the houses in Phase 1, financed by a bridging loan of RM4.5 million from the 1st defendant and the completed houses have since been sold to third party purchasers on end finance, also granted by the 1st defendant.

It is against this factual background that the plaintiffs have preferred two claims against the defendants in these proceedings. The first of these is that due to the failure of the 1st defendant to secure and provide the end finance, the plaintiffs were unable to service the interests due on the bridging loan and with it their inability to complete Taman Mewah. This has resulted in great financial loss to them as they were not able to reap the profit that they would otherwise have made had the end finance been provided as promised. For this failure, the plaintiffs allege that the 1st defendant had been negligent when they represented to the plaintiffs that they, the 1st defendant, would take all necessary steps to procure the sum of RM26 million as end finance and such end finance would be available during the first quarter of 1984 and had that facility been forthcoming, the plaintiffs would have been in a position to meet their obligations towards the interest payments on the bridging loan. Alternatively, the plaintiffs allege such representations constitute a collateral warranty and in breach of this warranty, the 1st defendant failed to provide the whole or any part of the end finance.

For this first claim, the plaintiffs maintain that they are entitled to damages being the profits they would have made out of Taman Mewah from the sales of the completed houses in Phase 1.

The plaintiffs' second claim is founded on the 1st defendant's failure to act in good faith when exercising their power to sell the charged property. For this claim they allege that the 1st defendant had been negligent in the conduct of the 5 auctions and that such neglect was designed to ensure that there would be no bidders at the auctions and as this would necessitate a reduction in the reserve price at every subsequent auction, it enabled the 2nd defendant, the 1st defendant's wholly owned subsidiary, to purchase the property at a very much reduced reserve price and reap the benefits of the construction already done by the 1st plaintiff for their own purpose.

For this second claim, the plaintiffs maintain that they should be returned to the position they were in before the property was sold and their losses should be the difference of the reserve price of the property at the first auction less the outstanding sum then due and owing to the 1st defendant on the bridging loan and it is this difference that the plaintiffs claim to be the damages due to them on their second claim.

From the evidence it is clear that what is in issue is the reason why the 1st plaintiff had failed to complete Taman Mewah. They contend that they failed to do so as the 1st defendant had failed to provide the promised end finance with which they would have utilised to service the interests due on the bridging loan. The defendants, on the other hand, maintain that the project failed because of poor management and poor planning of the market for the houses on the part of the 1st plaintiff.

Taking the issue of poor management first, I find no evidence to establish that the 1st plaintiff had mismanaged the bridging loan resulting in the failure of the project. On the contrary, they utilised the funds fully to construct the 325 units of Phase 1 but the fact that they were unable to complete the construction of the houses was not due to their mismanaging the funds but due to their inability to service the interest payments due on the bridging loan.

Under AB18, the interest payments become due and payable a month after the bridging loan is released in part or in full. It is not disputed that the first disbursement of RM200,000 was made by the 1st defendant on 31 October, 1983, and that the interest became payable on 30 November 1983. After that date, the 1st plaintiff must have serviced the interest payments until the end of December 1984, as there is no complaint of any default during that period. Default only occurred after December 1984 when the 1st plaintiff were in arrears of 2 months interest. It is the plaintiff's case that they had depended on the promised end finance which they maintain

a should have been available to them by March 1984 to service the interest payments and I consider the failure to service the interest payments, *per se*, cannot substantiate the defendants' allegation that there had been poor management of their finances on the part of the 1st plaintiff.

If indeed the defendants' allegation that the 1st plaintiff had embarked on an ambitious project without due regard to the demand for the houses, is true, then on the evidence adduced, I consider that the 1st defendant are equally at fault for this omission. The 1st defendant's Branch Manager b in Johor Bahru at the relevant period, DW1, confirms that the 1st defendant had made an independent assessment of the viability of the project and it was only after they were satisfied that the project was to be a successful and lucrative one that the bridging loan and end financing facilities were approved.

Added to this is the fact that although RM21 million was negotiated to be the amount for the end finance and that was the amount applied for at AB15, what was in fact approved by the 1st c defendant at AB20 is the sum of RM26 million. This enhanced figure is a manifestation of the faith that the 1st defendant must have had that the project was a viable and profitable one.

Another factor is the interest shown by purchasers for as early as the first quarter of 1984, the 1st plaintiff had secured 47 buyers for the houses when work on the structure had only commenced in April/May of 1983.

There is evidence that after the 2nd defendant took over the project and sold the houses in Phase d 1 in 1988, they did not make any profit but instead incurred a loss of RM1 million. I consider that this loss is not conclusive that the project was a total disaster from the beginning. In 1988 there were other market factors to be reckoned with, the most significant of which was the recession which had set in from 1985 to 1988.

Considering the totality of the evidence, I am satisfied that the allegations of poor management and poor planning have not been made out by the defendants.

e It is not disputed that negotiations for the end finance were conducted by the representatives of the 1st plaintiff and the 1st defendant, they being the 2nd plaintiff, PW1, who was and still is a Director of the 1st plaintiff, and one Pang Wee Pat (Pang), the 1st defendant's Southern Regional Manager. As Pang could not be traced, I have only the evidence of PW1 as to what had transpired at the negotiation stage, and the first objection taken by the defendants is that PW1's evidence cannot be relied upon as it is at variance with the contemporaneous documentary f evidence before me.

PW1's oral testimony is that during the negotiations, Pang made 2 specific representations:

(1) that the 1st defendant would have no difficulty in procuring the syndicated end finance and that its availability was a certainty;

(2) that the first drawdown of the end finance would come during the first quarter of 1984;

g and these representations assured and convinced PW1 that the project would be successfully completed with such end finance. It was following these negotiations that AB15 was tendered and approved by the 1st defendant with the granting of a bridging loan of RM3.5 million and a syndicated loan for RM26 million through their letter AB17-22. It is this letter which the plaintiffs rely to support their contention that the 1st defendant had expressly or by necessary implication represented to the 1st plaintiff that a syndicated end finance of RM26 million would h be made available to the purchasers of Taman Mewah.

Before I consider the nature of the undertaking given by the 1st defendant in AB17-22, let me first of all determine the objections raised by the defendants on AB17-22 itself.

The defendants maintain that AB17-22 is only a conditional contract insofar as it relates to the end financing facility and that the obligation to provide end finance is conditional upon the 1st defendant being paid their management fee of RM130,000 and the execution of a master i agreement as specified at AB21 and since neither of these events had taken place, the 1st defendant's obligation had not arisen.

I do not consider this objection can carry much weight for if indeed that was intended by the 1st defendant when they wrote AB17-22, their subsequent conduct in preparing the placement memorandum jointly with the 1st plaintiff and using it to invite potential financial institutions to participate in the syndication of the end finance does not support such intention. On the contrary, their conduct amounted to their giving their unqualified commitment to make available the end finance subject to the terms and conditions of AB17-22, one of these being the payment of a management fee upon the execution of a master agreement. The fact that no payment had been made nor a master agreement executed does not make AB-22 less absolute.

The defendants also question the fact that no Architect's certificates were produced to show the stage of works done to enable the end finance to be drawn down pursuant to clause 4(2) of the sale and purchase agreements entered into with individual purchasers as seen in Bundle AC. What was produced at AB196-213 are Architect's certificates issued to sub-contractors and the Architect's progress reports issued to the 1st plaintiff which do not show the stage of construction of the houses.

My answer to this objection is that the obligation to provide the Architect's certificates had not arisen at all as no end finance had been provided. If the end finance was available, I am sure that the 1st plaintiff would have procured the necessary Architect's certificates and submitted them to the 1st defendant for the release of the money as is the accepted practice recognised in the building industry.

Turning to AB17-22, what is the nature and purpose of the undertaking given by the 1st defendant as regards the syndicated end finance? They maintain that as the Lead Manager, they were only to arrange and manage the end finance for the benefit of the purchasers of Taman Mewah. They argue that this is evident from the provisions of clause 5(1) of the sale and purchase agreements entered into by the 1st plaintiff with the individual purchasers appearing in Bundle AC and the placement memorandum, AD5-100. Through AD5-100, they had sounded other financial institutions as seen from AD101-110 and the fact that Public Finance Berhad, Malaysia Credit Finance Berhad and Malayan Banking Berhad had initially responded positively but later withdrew their participation should not be regarded as omissions on their, the 1st defendant's part to provide end finance as they had never undertaken to do so in the first place. In any event, it would have been premature for the 1st plaintiff to expect the syndicated end finance to be made available even before the potential financial institutions had agreed to come in to participate and this makes it more unlikely that they, the 1st defendant, could have represented to the 1st plaintiff that the end financing facility was a certainty.

On the face of AB17-22, I could not agree more with the 1st defendant's contentions but it must be remembered that prior to the issue of AB17-22, there had been active negotiations between PW1 and Pang over the provision of end finance. This is clear from the evidence of PW1 when he testified that he was assured by Pang that an entity of the 1st defendant's financial standing would have no difficulty in procuring the syndication of the end finance and that the sum of RM21 million, the amount that was then under consideration as the end finance, was "peanuts" as far as the 1st defendant were concerned and that the first drawdown of the end finance was available during the first quarter of 1984.

It was these assurances that led PW1 to believe that the end finance was a certainty as the 1st defendant would not encounter any difficulty in getting the necessary participation from interested financial institutions and assured of the fact that end finance was in place, the 1st plaintiff started constructing the 325 units of Phase 1 in January 1984 expecting them to be completed by the end of 1985.

Apart from denying there was such oral representations made, the defendants also contend that PW1's evidence of such oral representations is inadmissible as the plaintiffs had never pleaded it in their re-re-amended statement of claim. What is pleaded at paragraph 7 is the presence of such representations appearing on the face of AB17-22 and since parties are bound by their pleadings, the plaintiffs cannot rely on the oral representations allegedly made by Pang to PW1.

When PW1 testified on the oral representations, no objection was raised by the defendants of their admissibility and neither was PW1 cross-examined on his evidence. It is only after they had closed their case and at the submission stage that the defendants raised the objection for the first time and in rebuttal, I am referred to the case of *Overseas Chinese Banking Corporation Ltd. v. Philip Wee Kee Tuan* [1984] 2 MLJ 3. In that case, the issue that was raised in the Privy Council was whether a letter acknowledging a debt due from the respondent to the appellant could be relied upon by the appellant as the letter was not pleaded. The trial Judge gave judgment in favour of the appellant relying on the letter of acknowledgment but on appeal, the Federal Court allowed the appeal and held that as the letter had not been pleaded, the respondent was entitled to judgment. The Privy Council, however, disagreed with the finding of the Federal Court and allowed the appeal and held that once the letter of acknowledgment was tendered in evidence and no objection that the letter had not been pleaded was taken at that proceedings, it became part of the total material on which the trial Judge had to decide the case.

The Privy Council reasoned that if objection had been taken and an application made to amend the pleadings, this could have been successfully opposed. But once the letter is received in evidence without objection, the consideration to oppose becomes immaterial.

Likewise, as the defendants elected not to raise any objection to the admissibility of PW1's evidence on the oral representations at the time such evidence was tendered, I consider it is too late to raise the objection at the submission stage.

Not to be outdone, the defendants argue that they could not object or cross-examine PW1 on his evidence as they did not have the benefit of Pang's instructions to do so, he could not be located to serve a subpoena on him. There is no evidence to show what attempts were made to trace Pang and neither is there any evidence to show at what point of time it became apparent that Pang's whereabouts could not be traced. Evidence of this is relevant as it may well be that as a tactical manourve, the defendants elected not to cross-examine PW1 on the oral representations as they may well have expected that at the right time Pang could be produced to give his version of what had transpired. As it is, his whereabouts continues to be a mystery and to that end, PW1's evidence on the oral representations remains unrebutted and unchallenged.

In any event, paragraph 7 of the re-re-amended statement of claim whilst averring to the express representations in AB17-22, also pleads "necessary implication" in the alternative. Those words must carry some weight or meaning and they must refer to the oral representations and if indeed the defendants were in doubt as to what "necessary implication" relate to, they could have made discovery and requested for further and better particulars. Needless to say, this was not done but despite this omission, the presence of paragraph 7A in the re-re-amended statement of claim should be a clear indication to the defendants that the representations relied upon by the plaintiffs are not only confined to those expressed in AB17-22 but to oral representations as well. This is clear from the averments of paragraph 7A as it made reference to a further oral representation that the initial drawdown of the end finance would be in the first quarter of 1984. This is not expressed in AB17-22.

Then again there is paragraph 13 which avers to the existence of a collateral warranty arising from the representations. Since the nature of a collateral warranty stems from oral as opposed to expressed representations, this should have put the defendants on notice that the plaintiffs rely on both expressed and oral representations to support their claim for the tort of negligent misrepresentation.

As both oral and express representations have been sufficiently pleaded, the defendants' contention that PW1's evidence on the oral representations is at variance with AB17-22 cannot be upheld. On the contrary, PW1's testimony evidences the implied term that the 1st defendant would make available the end finance either through the syndication of a number of lender banks for the total amount of RM26 million or through their single commitment to the extent of RM5 million.

Despite the absence of Pang, the defendants still maintain that he could not have represented to PW1 that end finance would be provided but what he could have represented was that the

1st defendant had the capacity to provide it. On balance, I would say that the conversation on the 1st defendant's capacity to provide end finance would not have arisen if there had not been a representation made that the 1st defendant were able to provide it. That is borne out from their willingness to provide RM5 million as their contribution for the end finance even before any attempt was made to sound out any other financial institutions.

It is also the defendants' contention that end finance could not be provided because there were not enough participants amongst the financial institutions approached. In this respect there is ample evidence to show that at least 3 other financial institutions besides the 1st defendant had shown interest in the project. Through AD111-115, Public Finance agreed to participate to an amount not exceeding RM3 million subject to the condition, *inter alia*, that their contribution be secured by 2 undertakings to be made by the 1st plaintiff and 1st defendant. These undertakings relate to the 1st plaintiff and the 1st defendant relinquishing their rights and interests over those houses purchased with the end finance so that the same houses could be charged to Public Finance as security for the facility they intended to provide. It is not disputed that the 1st plaintiff provided the undertaking and executed the security documents in favour of Public Finance but the 1st defendant however gave a conditional undertaking at AB128 which was not acceptable and, as a result, Public Finance withdrew their participation.

As for Malaysia Credit's pledged participation to the extent of RM3 million and Malayan Banking's participation to the amount of RM5 million, there is evidence to show that delay was the cause of their pulling out and since it was the 1st defendant who should have pursued their participation, the 1st defendant must accept the blame for their non-participation.

Since Public Finance, Malaysia Credit and Malayan Banking have valid reasons to withdraw from the syndication, what explanation can the 1st defendant offer for not fulfilling their commitment to provide the RM5 million end finance? Unlike the other 3 financial institutions, the 1st plaintiff had through AB216-228 provided the 1st defendant with the security that was asked. That security was executed in November 1984, that very crucial point in time when the 1st plaintiff was out of funds to complete Phase 1. In this respect, there is evidence to show that the 1st plaintiff were already experiencing financial difficulty even before that, as their letter AD123 dated 13 July, 1984, requested an additional RM1 million loan from the 1st defendant. There is no evidence as to the outcome of this request but, nonetheless, there is evidence to show that with the booking fees and the 10% purchase price deposited by the purchasers, the 1st plaintiff were able to continue with the construction works until January 1985 when the works came to a complete stop.

PW1 had even testified that had the 1st defendant, Public Finance, Malaysia Credit and Malayan Banking come in, then with their proposed participation to the total extent of RM16 million, the 1st plaintiff would be able to complete the houses in Phase 1 and secure the sales of the houses to the individual purchasers who had already executed sale and purchase agreements with them.

In any event, by reason of AB17-22 and AB216-218, I consider that the 1st defendant are contractually bound to provide their contribution of the end finance and their failure to do so had resulted in the failure of the 1st plaintiff to service the interest payments due on the bridging loan.

In this respect, the defendants argue that the only persons who had suffered loss at all as a result of the 1st defendant's failure to provide the end finance are the purchasers of the houses as the end finance was intended solely for their benefit. The defendants maintain that the plaintiffs are not the proper parties to complain.

It is very true that the end finance was to enable the purchasers to buy the houses but it is also true that the proceeds of sale of the houses provided through the end financiers would go to the developer, the 1st plaintiff, who in the course of developing the property, would utilise or plough back such proceeds into the project and one form of utilisation is the payment of interests due on the bridging loan. This practice is confirmed by the defendants' own witnesses, DW1 and

DW2. DW1 testified that the 1st defendant were fully aware that repayment would come substantially from the end finance. He than goes further to inform that "it is the common practice in this country for developers to repay the bridging loan from the purchasers providing the end finance if there are sufficient sales". Evidence of such sales is found in AB138, a letter dated 21 March 1986, written by the 1st plaintiff's solicitors confirming that out of the 209 units of the low cost houses, the 1st plaintiff had already managed to sell 122 units and for the remaining 87 units, there were already buyers for 23 units, leaving a balance of 64 units, half of which were reserved for MCA members and the other half for Bumiputras. As for the 116 units of double storey terrace houses, 18 units were already sold and from the balance of 98 unsold units, the 1st plaintiff had already found ready buyers for 22 units, leaving only a balance of 76 units unsold.

Considering the totality of the oral and documentary evidence that had been adduced before me, I have no doubt that the 1st defendant must have represented to the 1st plaintiff that the availability of end finance was a certainty and that the first drawdown would be in the first quarter of 1984.

Having decided so, was Pang negligent in making the representations as the essence of the tort of misrepresentation is the negligent manner in which the statement was made. For obvious reasons, negligent statements can take shape in a wide variety of different forms. They are in no way restrictive and the statements alleged to be negligently made have to be viewed in the light of the facts and circumstance of each case. Thus careless advice, opinions, evaluations and dissemination of information are all capable of giving rise to a duty of care when based on special knowledge or skill upon which a plaintiff claims to have relied to his detriment by suffering economic loss.

The elements giving rise to such a duty of care are summarised by **Charlesworth & Percy on Negligence,** 8th Edn., at p. 83, to be as follows.

(a) it must concern a business or professional transaction.
(b) the informant either realises or ought to have realised that he was being trusted as a matter of importance to give advice or express an opinion or disclose the best information known to him, since his statement was likely to be the basis upon which the recipient intended to act, and
(c) in all the circumstances it was reasonable for the recipient to act on such advice, opinion or information.

There can be no doubt as to the requirement of element (a) as the statements relied upon by the plaintiffs refer to a business transaction. DW1 testified that he was not involved in the detailed discussions over the loans but they were done by Pang, the 1st defendant's Chief Manager, Southern Region, the person who had the authority to approve loans on behalf of the 1st defendant. Because of the position he held in the 1st defendant, Pang must realise he was trusted to give all the necessary information on which PW1 can act. PW1 had testified he had no reason to doubt Pang's statements and from the circumstances of this case, it is not unreasonable to conclude that PW1 had acted on the statements to the detriment of the 1st plaintiff.

I now come to the plaintiffs' alternative claim that the representations made by Pang amounted to a warranty and a breach of it occurred when no part of the end finance came from the 1st defendant.

To establish the presence of a collateral contract, the plaintiffs must now show:

(1) that there must be a representation which was intended by the defendants to be relied upon;
(2) the representation induced the signing of the contract;
(3) the representation itself must amount to a warranty, collateral to the main contract and existing side by side with it.

I have already made a finding that Pang did utter the statement which resulted in AB17-22 being issued and accepted, the charge, AB31-47, executed in favour of the 1st defendant and the guarantee, AB23-30, executed by the 2nd plaintiff being the other security given for the

bridging loan. PW1 had also testified that if in August 1983 the 1st defendant had indicated that they could not provide the syndicated loan, he would have sought the facilities elsewhere. As Pang was not available to give his version of what had transpired, it is not open for the defendants to assume firstly that Pang did not make the oral representations and secondly if indeed he had uttered them, he had no intention that the 1st plaintiff would rely on them.

As I have indicated above, Pang was the 1st defendant's Chief Manager, Southern Region, and in that capacity had the authority to approve loan facilities on behalf of the 1st defendant. There is also the evidence of DW1, DW2 and DW4 that where a developer buys land for the purpose of developing it, the availability of end finance is an important consideration for him and usually the developer takes the end finance to repay the bridging loan. This aptly describes the situation the 1st plaintiff found themselves in when PW1 approached Pang for a bridging loan and end finance and on being made aware of the 1st plaintiff's purpose and intentions, Pang must be presumed to have intended that whatever representations he made on the availability of end finance would be relied upon by the plaintiff.

The other factor to be determined is whether AB17-22 was executed in reliance of the representations. The defendants maintain that it could not have been so, as there was a lapse of about 2 months from the time the utterances were made in July/August 1983 to the time AB17-22 was executed in October 1983. The defendants contend that the reliance must be shown to have happened at the time the parties executed AB17-22 as enunciated by Raja Azlan Shah J. in the case of *Tan Swee Hoe Co. Ltd. v. Ali Hussein Bros.* [1980] 2 MLJ 16.

From my perusal of the case, I find that the pronouncement was made after 3 recent English decisions were considered by the Federal Court and based on the peculiar facts of those 3 cases, His Lordship made the following observations:

> In our view these cases are strong authority for the proposition that an oral promise given at the time of contract which induces a party to enter into the contract, overrides any inconsistent written agreement.

The facts of *Tan Swee Hoe*'s case in themselves show that it is not necessary that the oral promises must be made at the time of the written contract. In 1957, the respondents in that case were looking for premises in Kluang to carry on the business of an eating shop and found one belonging to the appellants which however was not suitable for the respondent's purpose. Negotiations then commenced with the appellants who wanted RM14,000 tea money as consideration for the respondents occupying the premises. A reduction in the tea money was offered but rejected and finally an oral agreement was reached, whereby the respondents can rent the premises on payment of RM14,000 as tea money and they could stay on the premises as long as they wished provided rentals were paid regularly. That was in 1957 and no written tenancy agreement was entered into until 1961 when the parties entered into a written agreement wherein the rent was increased from RM200 to RM220 per month. No mention was made of the oral assurance. Then in 1967 another written agreement was entered between the parties increasing the rent from RM220 to RM254 per month. In 1968 there was a dispute over rentals and the appellants filed their suit seeking vacant possession, arrears of rent, *mesne* profits and damages.

From the facts it is clear that the written agreements were only executed well after the oral assurances were made and to that extent, there is no requirement in law that reliance on oral representations is only acceptable if made at the time the written contract was entered into.

In any event, on the facts of the case before me, there is only a 2 month break between the oral utterances and the execution of AB17-22 which I consider to be reasonable bearing in mind that AB17-22 involves the development of a RM35 million project and that the period was necessary to enable the defendants to consider their commitments and obligations for a project of that nature.

Finally the defendants contend that the representations cannot constitute a collateral contract as it contradicts AB17-22. In this instance, the substance of the oral promises were not imported

into AB17-22 which deals only with the terms and conditions relating to the approval of the bridging loan and end finance.

As the nature of a collateral contract is such that it constitutes a separate contract which exists side by side with the main contract, it follows that the oral promises do not contradict AB17-22 but that they merely evidence the assurance by the 1st defendant that they were capable and able to provide the end finance to the 1st plaintiff. In any event, *Tan Swee Hoe's* case decided that a collateral agreement can exist side by side with the main agreement it contradicts.

For the reason that I have given, the plaintiffs have also successfully made out a case on the alternative plea that the defendants' oral representations constituted a collateral warranty and that there had been a breach of it when no part of the end finance came from the 1st defendant.

Paragraphs 16-21 of the re-re-amended statement of claim contain facts and allegations that the 1st defendant had breached their duty of care when they exercised their power of sale as chargees of the 1st plaintiff's property. The plaintiffs have also averred that the 2nd defendant had aided and abetted the 1st defendant in the commission of the acts particularised in paragraph 18.

Evidence was led to establish:

(1) that the sale of the property was at an undervalue and for this purpose the basis of fixing the reserve price was put in issue;
(2) that the 1st defendant had been negligent in the conduct of the 5 auctions;
(3) that there was a fraudulent intention on the part of the 1st defendant to purchase the property through the 2nd defendant.

However, in the course of his submission, Mr Sri Ram, Senior Counsel for the plaintiffs, conceded that his clients were no longer complaining that the sale was at an undervalue and neither did he strenuously question the acts or omissions of the 1st defendant in the conduct of the 5 auctions. However, the plaintiffs labelled the 2nd defendant's action in successfully bidding at the fifth auction as being a contemplated move on the part of the 1st defendant to acquire the property at the lowest price possible to the detriment of the plaintiffs and to that end the plaintiffs maintain that the purchase was fraudulently made.

From the evidence it is clear that the 1st defendant only envisaged the intention to purchase the property after the first 3 auctions proved abortive. This is borne out by the fact that 10 days before the fourth auction fixed for the 9 November, 1986, the 1st defendant had through their letter dated 29 October 1986, AD161, sought Bank Negara's permission to bid at the fourth auction, where the reserve price had already been fixed at RM3.5 million. Unfortunately Bank Negara's approval at AD165 only came on 19 November 1986, well after the fourth auction, and as a result the 1st defendant could not bid at the fourth auction and neither were there any other bidders. Following this the 1st defendant appeared before the Senior Assistant Registrar in Johor Bahru on 10 January 1987, where an order was obtained reducing the reserve price from RM3.5 million to RM3.2 million and setting the next auction for 25 January 1987. It was at this fifth auction that DW1 successfully bid for the property at RM3.2 million. DW1 was the only bidder.

It is the plaintiffs' contention that since Bank Negara's approval only allowed the 1st defendant to bid for the property at the reserve price of RM3.5 million, DW1 had acted contrary to the express condition of Bank Negara when he bidded at RM3.2 million, thereby causing loss to the plaintiffs.

In this respect, a letter, AG3, dated 5 March 1987, written by the 1st defendant to Bank Negara was tendered to show that on 21 January 1987, just 4 days before the auction, a meeting was held between representatives of Bank Negara and the 1st defendant and one of the matters agreed at the meeting was that the 2nd defendant could bid for the property on 25 January 1987, at the reserve price of RM3.2 million.

It is true that AG3 was not written by Bank Negara but all the same I have no reason to doubt its contents and since the reserve price of the property at the fifth auction had already been reduced by the Court to RM3.2 million, it is reasonable to expect Bank Negara to adhere to the reduced reserved price fixed by Court. In any event, when Bank Negara gave its approval to the 1st defendant to bid for the property at the reserve price of RM3.5 million, it was in answer to the 1st defendant's request that they be allowed to bid at the fourth auction where the Court had already fixed the reserve price at RM3.5 million. Unfortunately that approval came too late. If it had come before the fourth auction, I am sure that the 1st defendant would have bid for RM3.5 million.

On the facts, I do not consider that the defendants had acted in bad faith to warrant the plaintiffs concluding that the purchase of the property by the 1st defendant was made fraudulently. To that extent, the plaintiffs' second claim must fail.

I now come to consider the defendants' last defence that irrespective of my findings of the issues raised in all the causes of action relied on by the plaintiffs and pleaded in paragraphs 6-14 of their re-re-amended statement of claim, the plaintiffs are estopped from raising such issues by reason of *res judicata* or issue estoppel in its broader application.

This plea stems from separate proceedings commenced by the 1st defendant against the plaintiffs prior to the filing of this suit. In Johor Bahru Originating Summons No. 210/85, the 1st defendant as chargees of the property commenced foreclosure proceedings against the 1st plaintiff to recover the outstanding amount due on the bridging loan and on 17 July 1985, obtained an order of Court to sell the property by way of public auction. The 1st plaintiff did not contest the proceedings and neither the 2nd defendant nor the 2nd plaintiff were cited as parties.

The filing of the foreclosure proceedings was followed on 8 May 1985, by the 1st defendant filing Johor Bahru Civil Suit No. 354/85, seeking to enforce the guarantee dated 29 October 1983, executed by the 2nd plaintiff and the other Directors of the 1st plaintiff. This guarantee and the charge executed by the 1st plaintiff were the securities provided by the plaintiffs for the bridging loan. Following a contested Order 14 proceedings, the 1st defendant obtained final judgment against the 2nd plaintiff for the sum of RM3,673,051.50 together with interest and costs on 5 March 1986. Neither the 2nd defendant nor the 1st plaintiff were parties to this earlier civil suit.

It is the defendants' contention that since all the issues raised in the proceedings before me have been pleaded as defences and argued extensively by the 2nd plaintiff in the Order 14 proceedings in the earlier civil suit, firstly before the Senior Assistant Registrar and secondly before the Judge in Chambers on appeal, and both had found the issues to be unconvincing, there had already been a final decision on those issues for which the plaintiffs are estopped from raising them again in these proceedings before me. The defendants also rely on the broader application of *res judicata* that the issues now raised by the plaintiffs to support their causes of action on negligent misrepresentation and breach of a collateral warranty could and should have been raised and litigated upon in the earlier civil suit.

On the same token, the defendants maintain that the same issues could and should have been raised in the foreclosure proceedings before the Johor Bahru High Court.

The plaintiffs contend that since the order for sale in the foreclosure proceedings was obtained by the 1st defendant on 17 July 1985, and the events giving rise to the plaintiffs' second cause of action occurred between 12 September 1985, and 25 January 1987, the period of the 5 auctions, *res judicata* is not applicable as such events occurred well after the earlier civil suit and judgement had been entered.

My answer to this is that such a consideration is irrelevant as what is in issue is whether the matters raised by the plaintiffs in the proceedings before me in support of their second claim could have and should have been raised in the foreclosure proceedings. Reference that such matters could not have been raised in the earlier civil suit as being non-existent is, I consider, irrelevant and is of no consequence.

The plaintiffs also maintain that following the recent decision of the Supreme Court in the case of *Kandiah v. Public Bank* [1993] 4 CLJ 332, *res judicata* is not applicable to foreclosure proceedings as the order for sale is not a judgment or decree. This recent decision is in direct conflict with an earlier decision in the case of *Sindoma Realty Sdn. Bhd. v. Overseas Chinese Banking Corporation* [1989] 1 MLJ 377, where the Supreme Court held that *res judicata* and issue estoppel can arise from a foreclosure proceeding.

Faced with these conflicting decisions, I have no choice but to accept the later decision as it would appear that the later decision had overruled the earlier one. That was the stand adopted by the House of Lords in the case of *Moodie v. Inland Revenue Commissioners and Another* [1993] 2 All ER 49. When faced with the same predicament, the later decision was accepted in deference to the earlier one. Thus based on the authority of *Kandiah v. Public Bank*, the defendants cannot rely on the plea of *res judicata* or issue estoppel either in its narrow or broader application as the answer to the plaintiffs' second claim in the proceedings before me. In any event, I have already decided that the plaintiffs' second claim has not been substantiated.

The plea of *res judicata* is founded on the basis that since a decision has been made in any case or matter, there should be a finality in that decision and the parties affected by the decision or their privies are estopped from litigating the same cause or matter in subsequent proceedings before the same or another forum.

It is now settled law that for the plea to succeed, the following requirements must be present.

(1) The same issues must have been decided in both proceedings.
(2) The judicial decision said to create the estoppel was final.
(3) The parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised.

It is only in respect of requirement (3) that the plaintiffs question the applicability of *res judicata* on the ground that there is no unity of parties or interest as the 1st plaintiff were not cited as a party in the earlier civil suit.

That is very true but it must be remembered that as a Director of the 1st plaintiff and the person actually involved in the conduct of the affairs of the 1st plaintiff, PW1 is an agent of the 1st plaintiff and as the principal, the 1st plaintiff must be presumed to be privy to all matters conducted by PW1 on behalf of the 1st plaintiff including all matters giving rise to the cause of action in the earlier civil suit. As the 2nd plaintiff was sued as a guarantor in the earlier civil suit in respect of the bridging loan that had been granted by the 1st defendant to the 1st plaintiff, there is therefore ample evidence to show that there is a privity of interest between the 1st plaintiff in these proceedings before me and the 2nd plaintiff in the earlier civil suit and to that end, *res judicata* is applicable to put an end to any further proceedings between the same parties based on the same facts which had already been litigated before or could have been raised and litigated in the earlier civil suit. To that end, the plaintiffs' principal cause of action on the tort of negligent misrepresentation and the alternative cause of action for a breach of a collateral warranty cannot be litigated again in this Court and on that finding I dismiss;

(1) the plaintiffs' principal and alternative claims on the ground of *res judicata* or issue estoppel in its broader sense.
(2) the second claim on the ground that it has not been substantiated.

Additionally, the plaintiffs shall pay the costs of these proceedings to the defendants.